(3)

No. 03-1276

Supreme Court, U.S.
FILED
APR 9 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRIAN G. NICHOLS,

Petitioner,

v.

CHICAGO TRANSIT AUTHORITY
HARDSHIP COMMITTEE
(DEFERRED COMPENSATION),

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois For The First Judicial District

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD W. BURKE
STEPHEN R. MEINERTZHAGEN
Counsel of Record
BURKE, WARREN, MACKAY &
SERRITELLA, P.C.
330 N. Wabash Avenue, 22nd Floor
Chicago, Illinois 60611
(312) 840-7000
FAX: (312) 840-7900

Attorneys for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether this Court should review the decision of the committee that administers Respondent Chicago Transit Authority Employees' Deferred Compensation Plan, denying Petitioner Nichols' application to withdraw funds from his plan account, based on the committee's interpretation that the loss of Petitioner's second job was not an "unforeseeable emergency" under the plan instrument, within the meaning of Section 457 of the Internal Revenue Code of 1986, 26 U.S.C. § 457.

2. Whether this Court should consider whether the Illinois Appellate Court denied Petitioner due process under the Fourteenth Amendment by not making a request, pursuant to Illinois Supreme Court Rule 363, to review a document that was not a trial exhibit nor part of the record on appeal, when Petitioner never even filed a motion with the Illinois Appellate Court requesting that it review the document.

PARTIES

The parties to this proceeding are Petitioner Brian G. Nichols and Respondent Chicago Transit Authority Employees' Deferred Compensation Plan, improperly sued and identified in the caption as "Chicago Transit Authority Hardship Committee (Deferred Compensation)."

RULE 29.6 STATEMENT

The Respondent is a deferred compensation plan funded by voluntary employee contributions, not a corporation. Consequently, no Rule 29.6 statement is required.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES, RULES AND CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	6
I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE ILLINOIS APPELLATE COURT'S DECISION AFFIRMING THE COMMITTEE'S INTERPRETATION AND APPLICATION OF THE PLAN INSTRUMENT	7
A. The Illinois Appellate Court Properly Deferred To The Committee And Found That Its Decision Was Not Unreasonable	7
B. Section 457 Is Not An Area Of Law Requiring Clarification By This Court	9
C. None Of The Reasons Set Forth In Supreme Court Rule 10 For Granting A Petition Are Present In This Case	10
II. NICHOLS' FOURTEENTH AMENDMENT DUE PROCESS ARGUMENT SHOULD NOT BE CONSIDERED BY THIS COURT	11

TABLE OF CONTENTS – Continued

Page

A. Nichols' Constitutional Due Process Argument Was Never Raised In Illinois State Court 11

B. Nichols' Due Process Argument Is Incomprehensible 12

III. THE REMAINING QUESTIONS PRESENTED IN NICHOLS' PETITION SIMPLY MAKE NO SENSE, AND ARE THEREFORE INAPPROPRIATE SUBJECTS OF REVIEW BY THIS COURT 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 11, 12

Firestone Tire & Rubber Co. v. Bruch, 49 U.S. 101 (1989) 6, 7

Heath v. Alabama, 474 U.S. 82 (1985) 11

Illinois v. Gates, 462 U.S. 213 (1983) 11

McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940) 11

Sanchez v. City of Hartford, 89 F.Supp.2d 210 (D. Conn. 2000) 10, 11

Schmitt v. Review Committee (the Copeland Cos.), 179 A.D.2d 959, 579 N.Y.S.2d 217 (N.Y App. Div. 1992) 10, 11

Yee v. Escondido, 503 U.S. 519 (1992) 11

STATUTES AND RULES

26 C.F.R. § 1.457-2(h)(4) (2004) 4

26 U.S.C. § 457 (2000) ..... *passim*

28 U.S.C. § 1257 (2003) 11

29 U.S.C. § 1321(b)(2) (2003) 7

S.Ct. Rule 10 ..... 6, 10, 11

Ill. S.Ct. Rule 363 ..... 2, 5, 6, 12, 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. XIV, § 1 1

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) 8

OPINIONS BELOW

The Circuit Court of Cook County, Illinois entered judgment in favor of Respondent on October 30, 2001. This judgment is not published. The Appellate Court of Illinois for the First Judicial District affirmed the judgment in an opinion entered on February 25, 2003, reported at 338 Ill.App.3d 829, 790 N.E.2d 1, 273 Ill. Dec. 859 (No. 1-02-0210). The Appellate Court of Illinois denied rehearing on June 10, 2003. On October 7, 2003, the Illinois Supreme Court denied Petitioner's petition for leave to appeal, which is reported at 205 Ill.2d 589, 803 N.E.2d 484, 281 Ill. Dec. 80 (Table, No. 96622).

JURISDICTION

The Petition asserts jurisdiction pursuant to 28 U.S.C. § 1257(a). Respondent denies that this Court has jurisdiction to review the due process argument raised in the Petition because this argument was not previously raised, at any level, during the state court proceedings in this case.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

The following statutes, rules and constitutional provisions are raised in the Petition:

U.S. CONST. AMEND. XIV, § 1:

> "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Illinois Supreme Court Rule 363:

> *"Inspection of original exhibits on appeal.* Whenever, in the opinion of the reviewing court, an inspection of an original exhibit not in the record on appeal is important to a correct decision of the appeal, the court may enter an order for its transmission, safekeeping, and return. The clerk of the reviewing court will receive the exhibit and hold it subject to the order."

26 U.S.C. § 457(d)(1):

> "[A] plan meets the distribution requirements of this subsection if –
>
> (A) under the plan, amounts will not be made available to participants or beneficiaries earlier than –
>
> (i) the calendar year in which the participant attains the age 70½,
>
> (ii) when the participant has a severance from employment with the employer, or
>
> (ii) when the participant is faced with an unforeseeable emergency (determined in the manner prescribed by the Secretary in regulations). . . . "

STATEMENT OF THE CASE

Nichols is a Chicago Transit Authority ("CTA") employee who voluntarily participated in the CTA Employees' Deferred Compensation Plan (the "Plan"). Nichols requested early

withdrawal of funds from his Plan account in connection with the loss of a second job, which he sought to characterize as an "unforeseeable emergency." The Committee that administers the Plan (the "Committee") denied Nichols' multiple applications for withdrawal on the basis that Nichols had not suffered an "unforeseeable emergency" authorizing early withdrawal. Both the Circuit Court of Cook County and the Appellate Court of Illinois applied a deferential standard of review to the Committee's denials. Both Courts found that the Committee's decision that Nichols' loss of a second job was not an event that qualified him for an "unforeseeable emergency" withdrawal, was not unreasonable, and affirmed the decision of the Committee denying Nichols' withdrawal requests.

The Plan is intended to qualify as an eligible "State Deferred Compensation Plan" under Section 457 of the Internal Revenue Code of 1986, 26 U.S.C. § 457 (2000) ("Section 457"). (R. Vol. I at 136; Plan § 1.1.)[1] Consistent with the distribution requirements for a Section 457(b) plan, which are set forth in 26 U.S.C. § 457(d)(1)(i)-(iii), and with which a state deferred compensation plan must comply to maintain its tax exempt status, an employee may withdraw funds from the Plan in the event of an "unforeseeable emergency" that creates "severe financial hardship." (R. Vol. I at 157; Plan § 5.12.) The Plan instrument defines an "unforeseeable emergency" as one of the following events: (i) a "sudden and unexpected illness or

[1] The Plan instrument is located in Volume I of the record on appeal at pp. 136-61 (hereinafter "R. Vol. ___ at ___)." Citation to the Plan instrument is made to both the Plan instrument section ("Plan, § ___"), and to the record on appeal.

accident"; (ii) "the loss of the Participant's property due to casualty"; or (iii) "other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant." (R. Vol. I at 157; Plan § 5.12.) This definition tracks the definition for "unforeseeable emergency" that the Secretary of the Treasury promulgated at 26 C.F.R. § 1.457-2(h)(4) (2004), under the rulemaking authority conferred by Section 457, and which was in effect at the time of Nichols' applications. Under the Plan instrument, the determination of whether a participant's circumstances constitute an unforeseeable emergency is in "the sole discretion of the Committee." (R. Vol. I at 157; Plan § 5.12.)

Between February and August 1999, Nichols made three applications for distribution from his deferred compensation account with the Plan on the basis that he had lost a second job. (R. Vol. I at 108-24.) Nichols' second job was with a credit union where he performed accounting activities. (R. Vol. I at 108-24.) This second job was contractual, and Nichols was required to resign each year. (R. Vol. II at 46-47.) For a number of years he was reappointed, at the option of the credit union, to continue his credit union employment. (R. Vol. II at 46-47.)

In the Statement of the Case section of Nichols' Petition, Nichols mischaracterizes the record when he says that he lost his second job "with no forewarning." (Nichols' Petition, p. 5.) In fact, at trial, Nichols himself testified that before his termination he heard rumors that he might not be rehired, and that in the year prior to his termination his salary had been reduced, and he had been removed from the credit union's board of directors. (R. Vol. II at 46.)

In each of his applications, Nichols sought to characterize the loss of his second job as an "unforeseeable emergency." (R. Vol. I at 108-24.) The Committee disagreed, and denied his applications. (R. Vol. I at 125-28 and 130-34.)

Nichols filed suit against the Plan in the Circuit Court of Cook County, seeking to have the Committee's denials of his requests for early withdrawal overturned. After a bench trial, the Circuit Court of Cook County entered judgment in favor of the Plan, finding that the Committee's denials of Nichols' requests for withdrawal did not constitute an abuse of the Committee's discretion in administering the Plan and interpreting the Plan instrument. On appeal, the Appellate Court of Illinois for the First Judicial District affirmed the Circuit Court's judgment, finding that the Committee's denials were not clearly erroneous, and agreeing with the Committee's determination that Nichols' loss of his second job was not an "unforeseeable emergency" under the Plan instrument.

At trial, during which Nichols was represented by counsel, he never sought to have admitted into evidence the document which he describes in his Petition as the "Section A – Event" form, nor was any reference to this document made before or during trial. Likewise, Nichols never requested that the Illinois Appellate Court allow him to submit the "Section A – Event" form so that it could be entered into the record on appeal, though he referenced the form in his briefs on appeal to that Court. After the Illinois Appellate Court affirmed the trial court's judgment in favor of the Plan, Nichols filed a Petition for Rehearing on March 13, 2003. It was in this Petition for Rehearing in which Nichols argued, for the first time, that the court "did not use the Supreme Court Rule 363 to request a copy

of vital documentation (Section – A Event form)[.]" (Petition for Rehearing, p. 2.) On June 10, 2003, the Petition for Rehearing was denied.

On July 15, 2003, Nichols filed his Petition for Leave to Appeal to the Supreme Court of Illinois. In that Petition, Nichols argued that "the Appellate Court failed to apply the Supreme Court Rule 363." (Petition for Leave to Appeal to the Supreme Court of Illinois, p. 2.) Not until Nichols' instant Petition for a Writ of Certiorari, however, did he argue that his constitutional due process rights were implicated when the "Section – A Event" form was not considered by the Illinois Appellate Court.

REASONS FOR DENYING THE PETITION

None of the questions presented in the Petition warrants this Court's review. The Illinois Appellate Court faithfully applied the principals set forth in *Firestone Tire & Rubber Co. v. Bruch*, 49 U.S. 101 (1989) in finding that the Committee's denial of Nichols' applications for distribution were not unreasonable. Further, litigation concerning the application and interpretation of the "unforeseeable emergency" provision of Section 457 is not an area of law that requires clarification by this Court, and this case does not raise any of the compelling reasons for granting a petition set forth in Supreme Court Rule 10. To the extent Nichols' Petition is based upon his Fourteenth Amendment due process argument, it should be denied because this argument was never presented or addressed at any previous stage of the litigation of this matter in the Illinois Courts, and because under the facts

of this case no genuine constitutional issues are implicated. Finally, the Petition should be denied because the other questions presented that Nichols lists in his Petition do not raise issues that were necessary (or even related) to the decisions in this case at either the trial or appellate level, and simply make no sense.

I. THERE IS NO REASON FOR THIS COURT TO REVIEW THE ILLINOIS APPELLATE COURT'S DECISION AFFIRMING THE COMMITTEE'S INTERPRETATION AND APPLICATION OF THE PLAN INSTRUMENT.

A. The Illinois Appellate Court Properly Deferred To The Committee And Found That Its Decision Was Not Unreasonable.

The Plan's decisions denying Nichols' applications for distribution were properly reviewed by the Circuit Court and Illinois Appellate Court under a deferential standard. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989), this Court held that when courts review decisions of benefits plan administrators in actions challenging the denial of benefits, they must look to the benefits plan instrument to determine the appropriate standard of review. While *Firestone Tire* involved an ERISA[2] plan, this Court looked to the common law of trusts for guidance as to the appropriate standard of judicial review because benefits plans are subject to trust law. *Id.* at 111. Specifically, this Court looked to the

[2] Section 457 Plans are excluded from ERISA. 29 U.S.C. § 1321(b)(2) (2003).

RESTATEMENT (SECOND) OF TRUSTS § 187 (1959) which states, "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse of the trustee of his discretion." *Id.* Following this fundamental principle of trust law, this Court held that the judicial review of benefit ineligibility determinations will vary in accordance with an extent of an administrator's power to construe the terms of the benefits plan. *Id.* at 110-15. When the administrator does not have any discretion to construe the terms of the plan, a reviewing court should make a *de novo* review of the administrator's interpretations. *Id.* at 115. However, where an administrator has discretion to construe a plan's terms, the reviewing court must review the administrator's determination deferentially, overturning the administrator's interpretations only if they constitute an abuse of discretion. *Id.* If a retirement benefits plan gives the trustee discretionary power, the trustee's "power to construe disputed or doubtful terms . . . will not be disturbed if reasonable." *Id.* at 111.

Section 5.12 of the Plan instrument expressly granted the Plan (acting through its Committee) discretionary authority with respect to the determination at issue in this case: "a distribution of Deferred Compensation credited to a Participant's account shall be permitted in the event the Participant experiences an unforeseeable emergency, *determined in the sole discretion of the Committee*." (R. Vol. I at 157; Plan § 5.12.) (emphasis added). Consequently, the Circuit Court and the Illinois Appellate Court properly applied a deferential standard in their review of the Plan's denials of Nichols' applications based upon the loss of his second job with the Credit Union.

Both the Circuit Court and Illinois Appellate Court refused to disturb the Committee's decision because it was not unreasonable. Obviously, Nichols' loss of his second job at the credit union was not a "sudden and unexpected illness or accident" or a "loss of the Participant's property due to casualty." The only question for the Committee was whether it was an "other similar extraordinary and unforeseeable circumstance[] arising as a result of events beyond the control of the Participant." According to the evidence introduced at trial, the loss of Nichols' second job was neither something that a reasonable person would find extraordinary, nor something that was so unusual that it could not be foreseen. The loss of secondary employment is commonplace, and in Nichols' situation it was hardly unforeseeable: his second job was contractual and he was required to resign each year; he had heard rumors that the credit union would not choose to reappoint him; and his compensation and responsibilities had been substantially reduced in the year preceding his termination. Under these facts, the Committee's denial of Nichols' applications was manifestly reasonable, and the reviewing courts' decisions not to overturn the Committee's decision were plainly correct.

B. Section 457 Is Not An Area Of Law Requiring Clarification By This Court.

Nichols' Petition should also be denied because the interpretation and application of the "unforeseeable emergency" provision required for Section 457 plans is simply not an area of substantial litigation requiring clarification by this Court. Indeed, in addition to the opinion of the Illinois Appellate Court, the Plan has only been able to locate two other published cases to address

the "unforeseeable emergency" provision. The first, *Sanchez v. City of Hartford*, 89 F.Supp.2d 210 (D. Conn. 2000) involved a request for distribution from a Section 457 plan where the participant's wife became ill during pregnancy and eventually gave birth to a child with life-threatening medical problems, causing her to discontinue her employment. Eventually, the wife took a part-time job at a drastically decreased monthly income. The Court found that the participant had experienced an "unforeseeable emergency" which entitled him to an early withdrawal because there was a sudden and unexpected illness of the participant's dependant, which fit the definition of "unforeseeable emergency" in the relevant plan instrument. *Id.* at 211-12. In the second case, *Schmitt v. Review Committee (the Copeland Cos.)*, 179 A.D.2d 959, 579 N.Y.S.2d 217 (N.Y. App. Div. 1992), the Appellate Division of New York's Supreme Court held that a committee's finding that a participant's financial mismanagement leading to delinquent federal income taxes did not constitute an "unforeseeable emergency," was not unreasonable. The law concerning "unforeseeable emergency" withdrawals under Section 457 plans is neither well-developed nor in need of clarification by this Court.

C. None Of The Reasons Set Forth In Supreme Court Rule 10 For Granting A Petition Are Present In This Case.

The Petition should also be denied because this case does not raise any of the compelling reasons for granting a petition set forth in Supreme Court Rule 10. The Illinois Appellate Court did not decide "an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States

Court of Appeals" as provided by Supreme Court Rule 10(b). Indeed, the *Sanchez* and *Schmitt* cases involve different facts than the instant case, but they in no way conflict with the decision of the Illinois Appellate Court. Likewise, the Illinois Appellate Court did not decide "an important question of federal law" that "should be [] settled by this Court" or "that conflicts with relevant decisions of this Court," as provided by Supreme Court Rule 10(c).

II. NICHOLS' FOURTEENTH AMENDMENT DUE PROCESS ARGUMENT SHOULD NOT BE CONSIDERED BY THIS COURT.

A. Nichols' Constitutional Due Process Argument Was Never Raised In Illinois State Court.

With "very rare exceptions," in reviewing state court judgments under 28 U.S.C. § 1257 (2003), this Court adheres to the rule that it will not consider federal claims unless they were either properly presented or addressed by the state court that rendered the decision that is being reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997), *Yee v. Escondido*, 503 U.S. 519, 533 (1992), *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-19 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Here, at no point during the trial or appeal of this case before the Illinois Courts did Nichols ever present his claim that the Illinois Appellate Court violated his Fourteenth Amendment due process rights when it did not request a copy of the "Section –

A Request" form. Indeed, the first and only time that Nichols raised this constitutional argument is in his instant Petition.[3] While this Court has addressed, but not decided, the issue of whether the rule that a federal claim must be addressed and properly presented in state court, is jurisdictional or prudential, *see Adams*, 520 U.S. at 90, there is simply no circumstance in this case to justify departing from this rule. Consequently, this Court should not consider Nichols' due process argument.

B. Nichols' Due Process Argument Is Incomprehensible.

In addition, this Court should not grant Nichols' Petition because his due process argument simply makes no sense. Nichols raises this argument because he wishes to rely on a document – the "Section A – Event" form,[4] which has never been part of the record in this case. Nichols' appears to contend that the Illinois Appellate Court should have requested a copy of the "Section A – Event" form pursuant to Illinois Supreme Court Rule 363. Nichols argues that when the Illinois Appellate Court did not request this document, it violated Nichols' due process rights under the Fourteenth Amendment. This argument is simply bizarre. The "Section – A Event" form was not a

---

[3] Nichols includes what purports to be a re-typed "Section A – Event" form at p. 23-a of the Appendix to his Petition. The Plan believes that this is the first time that Nichols has submitted this document to a court. Not only is Nichols' constitutional argument newly presented, but so is the document upon which it is apparently premised.

[4] In spite of all the fuss that Nichols raises about this form, it does not appear to be relevant to any issue in this case.

trial exhibit, and Nichols never sought to have it admitted into the record of this case, at trial or on appeal. Illinois Supreme Court Rule 363 allows a reviewing court to inspect an "original exhibit not in the record on appeal," if such an inspection is important to a correct decision of the appeal. However, the "Section – A Event" form *was never an original exhibit*. Illinois Supreme Court Rule 363 does not allow for a reviewing court to inspect records that were never previously presented in a case. Further, Nichols' argument is apparently that the Illinois Appellate Court should have made a request for the "Section – A Event" form *sua sponte*, because Nichols never even filed a motion with the Illinois Appellate Court requesting that it obtain this document. It is little wonder that Nichols does not cite a single authority (other than his misquotation of the Fourteenth Amendment itself), in support of his argument. Not only are no genuine constitutional issues raised in this case, but Nichols' due process argument makes absolutely no sense.

III. THE REMAINING QUESTIONS PRESENTED IN NICHOLS' PETITION SIMPLY MAKE NO SENSE, AND ARE THEREFORE INAPPROPRIATE SUBJECTS OF REVIEW BY THIS COURT.

In his Petition, Nichols lists five questions presented. In this Response, the CTA Plan identifies two questions presented,[5] and addresses why the Petition should not be

[5] Nichols' question presented no. 2 roughly corresponds with the Plan's question presented no. 1, and Nichols' question presented no. 4 roughly corresponds with the Plan's question presented no. 2.

granted with respect to these questions in the two preceding sub-sections of this Response. The remaining three questions presented by Nichols involve matters that have never been issues in this case, and are so incoherently drafted that they are not amenable to a reasoned response.

Nichols' questions presented no. 1 is as follows:

> "Whether the 457 Deferred Compensation Plan is a Savings Plan that was promoted as a means of providing financial security in the event of an unforeseeable emergency, or is it a Pension Plan."

Appearing to be at least somewhat related, Nichols' questions presented no. 5 is as follows:

> "Whether the Committee has the right to deny Petitioner access to his funds after a financial hardship has been established, given the fact that the Plan is not a Pension Plan."

The Plan is a Section 457 plan. No party to this case has ever argued that the Plan is a "Pension Plan," and Nichols cites nothing in the record to shed any light upon his claim that there is any issue in this case in this regard. By its very title, Section 457 sets forth requirements for "Deferred Compensation Plans of State and Local Governments and Tax Exempt Organizations." Under Section 457, participants defer compensation, receive certain tax-deferred benefits, and are permitted to withdraw funds in their accounts under specified circumstances. What could this possibly have to do with whether Nichols chooses to call the Plan a "Savings Plan" or a "Pension Plan"?

Nichols' questions presented no. 3 is equally perplexing:

> "Whether the Committee erred in its decision to use circumstantial evidence as the primary issue in their decision-making instead of the substantial evidence presented as documentation to support claim of Petitioner's hardship."

In his Petition, Nichols argues that "the record does not reflect the complete application and supporting documentation sent to the Committee for evaluation," and he makes reference to the "Section A – Event" form which is not part of the record on appeal. (Nichols' Petition, p. 7.) Is Nichols, who was represented by counsel at trial, arguing that the Plan is responsible for his own failure to seek the admission of evidence at trial upon which he now wishes to rely? It is not at all clear what he is trying to say, but plainly this would be an absurd argument.

The issues that Nichols seeks to raise in his Petition as questions presented nos. 1, 3 and 5 are so poorly worded and so confusing that it is impossible for the CTA Plan to do more than speculate as to Nichols' intended meaning. Such poorly constructed questions presented make inappropriate matters for the Court to review. Consequently, Nichols' Petition should be denied.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Dated: April 9, 2004

Respectfully submitted,

RICHARD W. BURKE
STEPHEN R. MEINERTZHAGEN
Counsel of Record
BURKE, WARREN, MACKAY & SERRITELLA, P.C.
330 N. Wabash Avenue,
22nd Floor
Chicago, Illinois 60611
(312) 840-7000
FAX: (312) 840-7900

Attorneys for Respondent